Supreme Court, U. S.
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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-838

STATE OF MAINE AND MICHAEL R. PETIT,
Commissioner of the Department of
Human Services, State of Maine,
Petitioners,

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT
and on Behalf of Others
Similarly Situated,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT
OF MAINE

PETITION FOR CERTIORARI FILED NOVEMBER 29, 1979
CERTIORARI GRANTED JANUARY 21, 1980

TABLE OF CONTENTS

ITEM	PAGE
Civil Docket Entries of the Maine Superior Court, Sagadahoc County	A1-6
Complaint, *Joline Thiboutot and Lionel Thiboutot* v. *State of Maine and David Smith, Commissioner*	A7-9
Amended Complaint, *Joline Thiboutot and Lionel Thiboutot* v. *State of Maine and David Smith, Commissioner*	A11-15
Maine Public Assistance Payments Manual, Chapter II, Section C, pages 1 & 2	A17-19
Answer to Amended Complaint	A21-22
Stipulations of Fact	A23-25
Motion for Separate Trial	A27
Class Certification Order	A29-30
Order and Judgment, Maine Superior Court, Sagadahoc County	A31-32
Motion for Award of Retroactive Benefits and Attorneys Fees	A33
Plaintiff's Request for Admissions and Interrogatories	A35-36
Affidavit (for plaintiff's attorney's fees) of Robert E. Mittel, Esquire	A37-38
Certification of Compliance with Court Order	A39
Defendant's Answers to Admissions and Interrogatories	A41
Final Judgment of the Maine Superior Court, Sagadahoc County	A43-44
Notice of Appeal by plaintiffs' Thiboutot	A45
Stipulation of plaintiff Thiboutots' monthly A.F.D.C. benefits	A46
ORDER, JUDGMENT and DECREE of the Law Court (Maine Supreme Judicial Court)	A47
Decision of the Maine Supreme Judicial Court	A49-65

STATE OF MAINE
SAGADAHOC, ss

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE and LIONEL THIBOUTOT
Robert Mittel, Esq.
178 Middle Street
Portland, Maine 04111

Plaintiffs

vs.

STATE OF MAINE and
DAVID SMITH
James E. Smith, Esq.
Assistant Attorney General
State House, Augusta, Maine

Defendants

COMPLAINT TO REVERSE
DECISION OF HEALTH & WELFARE DEPT.

April 16, 1976

Complaint filed by Robert Mittel, Esq.

January 7, 1977

Amended complaint filed by Robert Mittel, Esq.

March 2, 1977

Answer filed by James E. Smith, Esq.

March 3, 1977

Stipulation of Fact filed by Robert E. Mittel, Esq., and James E. Smith, Esq.

March 10, 1977

Plaintiff's first Interrogatories to defendant's filed by Robert Edmond Mittel, Esq.

April 6, 1977

Defendants answers to first interrogatories filed.

June 17, 1977

Stipulation for the entry of a Class certification Order filed. ORDER: Plaintiffs Motion for Class Certification is hereby granted. The class is defined as set forth out in that Motion.

/s/ Harold J. Rubin,
Justice, Superior Court.

June 17, 1977

Motion for separate trial filed. Motion granted as prayed for. Harold J. Rubin, JSC.

June 20, 1977

Class Certification Order: ORDERED that plaintiffs' Motion for Class certification of February 15, is granted. The class so certified is defined as follows: Families in which: (a) each of the two adults has child(ren) living with them which are stepchildren of the other spouse; (b) at least one of the adults has earned income; (c) there are mutual children of both adults living with them; (d) because of Defendant's policy as set forth by Maine Public Assistance Payments Manual, Appendix C, pages 1 and 2, all of the income which is spent to support the mutual children and which is not available to support the remaining children is nevertheless treated as available to those other remaining children.

July 15, 1977

ORDER AND JUDGMENT: Having reviewed the record and briefs and having heard argument of counsel, it is hereby Ordered, Adjudged and Decreed:

1. This Judgment shall be applicable to Plaintiffs class which is composed of families in which

(a) Each of the two adults have child(ren) living with them which are stepchildren of the other spouse;

(b) At least one of the two adults has earned income;

(c) There are mutual children of both adults living with them;

(d) Because of the Defendant's policy set forth in Maine Public Assistance Payments Manual, Appendix C all of the income which is spent to support the mutual children and which is not available to the remaining children is nevertheless treated as available to those other remaining children (the stepchildren).

2. Defendant's policy, as set forth in the Maine Public Assistance Payments Manual, Chapter II, Section C, page 7 (first paragraph and Appendix C, which requires families with stepchildren eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren income that is actually unavailable to them because their parents have a legal obligation under State law to use a portion of that income to support the mutual children, is in violation of 42 USC Section 602a (7); 45 CFR Section 233.20(a) (3) (ii) (D) and Maine Public Assistance Payments Manual, Chap. II, Sec. C., p. 1.

3. Defendants are permanently enjoined from enforcing the above policy and are ordered to amend Maine Public Assistance Payments Manual, Chapter II, Section C., Page 7, (First paragraph) and Appendix C, by adopting in their place new regulations not later than sixty (60) days from the date of the entry of this Judgment.

4. Within 90 days from the entry of this Judgment defendant shall certify to this Court that the new regulations required by Paragraph 3 have been adopted, that all members of plaintiffs' class have been notified of the new regulations and are receiving benefits in accordance with those new regulations.

5. The hearing decision of March 26th, 1976 in the case of Lionel and Joline Thiboutot is reversed and that case is remanded to the defendants for a new hearing at which time plain-

tiffs' entitlement for AFDC is to be determined pursuant to the regulations adopted pursuant to Paragraph 3.

6. There being more than one claim for relief before the Court and the Court having determined that there is no just reason for delay, this Judgment is to be entered as a final Judgment forthwith, pursuant to M.R.Civ.P. 54(b). The question of retroactive benefits is reserved for later hearing and the question of plaintiffs' entitlement to attorneys' fees is reserved for further hearing thereafter.

Dated: July 14, 1977 /s/ Harold J. Rubin,
Justice, Superior Court

August 24, 1977

Motion for Award of Retroactive Benefits and Attorneys Fees and Notice of Hearing filed by Robert E. Mittel, Esq.

September 22, 1977

Request for admissions and interrogatories filed by Robert Mittel, Esq.

October 7, 1977

Affidavit of Robert E. Mittel and Exhibits A & B filed.

October 17, 1977

Certification that the Order effective July 14, 1977 has been complied with filed by James Eastman Smith, Esq.

November 1, 1977

Answer to Interrogatories and admissions filed by James Eastman Smith, Esq.

February 15, 1978

ORDER: Argument of counsel having been heard and the record and briefs reviewed, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs Thiboutot are entitled to retroactive benefits.

2. Plaintiffs' Motion for retroactive benefits to each member of Plaintiff's class is hereby denied.

3. Plaintiff's motion for attorney's fees is hereby denied.

4. Plaintiff's motion for costs is hereby granted in an amount to be agreed upon between counsel, or, if counsel are unable to agree, in an amount to be determined by the Court after further hearing.

Dated at Bath, Maine
this 15th day of February, 1978 /s/ Louis Scolnik,
Justice, Superior Court

February 16, 1978

Judgment for the Plaintiff for retroactive benefits. Judgment for the plaintiff in regard to retroactive benefits to each member, and for attorneys fees denied. Judgment for costs to be agreed upon.

February 27, 1978

FINAL JUDGMENT: Pursuant to the Order of July 14, 1977, the parties having been heard through counsel orally and by briefs, it is ORDERED, ADJUDGED AND DECREED: 1. This final Judgment shall be applicable to Plaintiffs' class which is composed of families in which (a) each of the two adults have child(ren) living with them which are stepchildren of the other spouse; (b) at least one of the two adults has earned income; (c) there are mutual children of both adults living with them; (d) because of the Defendants' policy set forth in Maine Public Assistance Payments Manual, Appendix C, all of the income which is spent to support the mutual children is nevertheless treated as available to those other remaining children (the stepchildren). 2. Defendants' policy, as set forth in the Maine Public Assistance Payments Manual, Chapter II, Section C, Page 7 (First Paragraph) and Appendix C, which requires families with stepchildren eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren, income that is actually unavailable to them because their parents have a legal obligation under State law to use a portion of that income to support the mutual children, is in vio-

lation of 42 USC Section 602a (7); 45 CFR Section 233.20(a) (3) (ii) (d) and Maine Public Assistance Payments Manual, Chapter II, Section C, p. 1. 3. Defendants are permanently enjoined from enforcing the above policy and are ordered to amend Maine Public Assistance Payments Manual, Chapter II, Section C, Page 7, (First Paragraph) and Appendix C, by adopting in their place new regulations not later than sixty (60) days from the date of the entry of this judgment. 4. Plaintiffs Thiboutot are entitled to retroactive benefits. 5. Plaintiff's motion for retroactive benefits to each member of Plaintiff's class is hereby denied. 6. Plaintiffs' motion for attorney's fees is hereby denied. 7. Plaintiffs' motion for costs is hereby granted in an amount agreed upon between counsel, or, if counsel are unable to agree, in an amount to be determined by the Court after further hearing.

Dated at Bath, Maine
this 23rd day of February 1978 /s/ Louis Scholnik,
Justice, Superior Court

Copies of Final Judgment mailed counsel.

February 27, 1978

Entry of Judgment: Defendants are to amend Maine Public Assistance Payments Manual. Plaintiffs are entitled to retroactive benefits and for costs. Attorneys fees denied.

March 13, 1978

Notice of Appeal filed by Robert Edmond Mittel, Esq.

April 11, 1978

"LAW"

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No.

JOLINE THIBOUTOT and LIONEL THIBOUTOT, of Topsham, in the County of Sagadahoc, State of Maine,

Plaintiffs

vs.

STATE OF MAINE and DAVID SMITH, in his capacity as Commissioner of the Maine Department of Human Services, and his successors in office,

Defendants

COMPLAINT

INTRODUCTION

1. This is an action in the nature of mandamus and certiorari pursuant to M.R. Civ. P. 80B to review a decision of the Commissioner of the Maine Department of Human Services (sometimes hereinafter referred to as the Department).

2. The Plaintiffs, Lionel and Joline Thiboutot, are husband and wife. There are eight children, all of whom live with them: three of those are children of Lionel Thiboutot's by a former marriage; four of those are children of Lionel and Joline Thiboutot and one of those is a child of Joline Thiboutot by a former marriage.

3. The only family income outside of the AFDC Grant at issue in this case is Lionel Thiboutot's earnings from the N. T. Fox Lumber Company, which, after deductions for tax and work-related expenses, equals Three Hundred and Sixty-Seven Dollars ($367) per month.

4. On March 18, 1976 the Plaintiffs received a decision of Defendant Smith which upheld an earlier decision to reduce their AFDC Grant.

5. The decision of Defendant Smith rejected the Plaintiffs' argument that Joline Thiboutot should receive an AFDC Grant of Sixty-Four Dollars ($64) for herself and her child by a former marriage and that Lionel should receive an AFDC Grant of Two Hundred Seventy-Eight Dollars ($278) for himself and his three (3) children by a former marriage.

6. The decision of the Commissioner to not allow any AFDC benefits for Lionel was based on the Commissioner's decision that Lionel's income was not to be reduced:

a) by the proportional amount of his income necessary to support his wife and their four mutual children, none of whom are eligible recipients for AFDC, and all of whom Lionel has a legal duty to support;

b) that Lionel, as a new applicant rather than a recipient still eligible (as of the date of the hearing) for AFDC, was not entitled to the "30 and 1/3" work incentive disregard.

7. Because the Commissioner did not allow Lionel any deductions from his income, his income exceeded the ratably reduced standard of need for himself and his three (3) children by a former marriage and the Commissioner therefore found him ineligible to receive AFDC benefits.

CLAIM FOR RELIEF

8. The decision of the Commissioner of March 18, 1976 is erroneous and constitutes a gross abuse of discretion because Lionel's income is computed on the basis of income which is not actually available. It is therefore in violation of applicable state and federal law: 45 C.F.R. § 233.20(a) (3) (ii) (D); Maine Public Assistance Payments Manual II, C. 1.

PRAYER

1. Reverse the decision of the Commissioner.

2. Issue a Declaratory Judgment invalidating the Commissioner's Policy of including income which a parent must, pursuant to state law, use to support persons not eligible to receive AFDC through the grant of such parent.

3. Grant such other relief as is necessary and proper.

Dated: April 14, 1976

/s/ Robert Edmond Mittel,
Attorney for Plaintiffs
178 Middle Street
Portland, Maine 04111

STATE OF MAINE SAGADAHOC, ss.	SUPERIOR COURT Civil Action Docket No. CA-76-33
JOLINE THIBOUTOT and LIONEL THIBOUTOT, of Topsham, County of Sagadahoc State of Maine, *Plaintiffs* vs. STATE OF MAINE and DAVID SMITH, in his capacity as Commissioner of the Maine Department of Human Services and his successors in office, *Defendants*	AMENDED COMPLAINT

INTRODUCTION

1. This is a civil action in which Plaintiffs seek, by way of mandamus and certiorari pursuant to M.R.Civ.P. 80B to review a decision of the Commissioner of the Maine Department of Human Services (hereafter the Department). Pursuant to the applicable provisions of the Social Security Act, 42 USC § 601, et seq, and its interpretative federal and state regulations and 42 USC § 1983, Plaintiffs also seek declaratory and injunctive relief. Plaintiffs have been wronged by Defendants' policy which requires families with stepchildren eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren, income that is actually unavailable to them because their parents have a legal obligation under state law to use a portion of that income to support the mutual children.

PARTIES AND JURISDICTION

2. The jurisdiction of this Court is invoked under M.R.Civ. P. 80B and 14 MRSA §§ 5951 and 6051 by which Plaintiffs seek injunctive and declaratory relief.

3. The Plaintiffs, Lionel and Joline Thiboutot, are husband and wife. There are eight children in the family, all of whom live with them; three of those are children of Lionel Thiboutot; four of those are children of Lionel and Joline Thiboutot and one of those is a child of Joline Thiboutot.

4. Plaintiffs bring this action as a class action pursuant to M.R.Civ.P. 23. The members of the class are so numerous as to make joinder impractical and there are questions of fact and law common to the class; this is the type of action in which injunctive relief is the appropriate remedy for Defendants' conduct.

5. Plaintiffs' class is composed of families in which:

a) At least one of the two adults has child(ren) living with them which are stepchildren of the other spouse;

b) At least one of the two adults has earned income;

c) There are mutual children of both adults living with them;

d) Because of Defendant's policy set forth below in paragraph 10 all of the income which is spent to support the mutual children and which is not available to remaining children is nevertheless treated as available to those other children.

6. The only family income, outside of the AFDC grant at issue in this case, is Lionel Thiboutot's earnings from the N. T. Fox Lumber Company, which, after deductions for tax and work-related expenses, equals $490.00 per month.

7. Defendant David Smith is the Commissioner of the Department of Human Services. Throughout all pertinent periods he was acting in his official capacity under color of state law.

FACTS

8. Plaintiffs' AFDC grant has been reduced by a final administrative decision of David Smith dated March 18, 1976.

9. The decision of David Smith to reduce the benefits was based on a determination that Lionel's available income was to include the proportional amount of his income necessary to support the four mutual children.

10. Since that date Defendant Smith has promulgated a regulation, M.P.A.P.M. Appendix C, attached here as Appendix 1, which is interpreted by him to require families with step-children eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible step-children, income that is actually unavailable to them because their parents have a legal obligation under state law to use a portion of that income to support the mutual children.

11. The four mutual children are not eligible for AFDC.

12. Lionel has a legal duty to support the mutual children.

FIRST CLAIM FOR RELIEF

13. Applicable state and federal law requires that only available income be counted in determining a family's income when their AFDC grant is computed.

14. Only a proportion of Plaintiffs' income of $490.00 per month is available for themselves and their own children who are eligible for AFDC because the remainder must, by law, be used to support their four mutual children who are not eligible for AFDC.

15. Defendants' conduct, as set forth above in paragraph 10, counting as available income that remainder is a violation of

a) 42 USC § 602(a) (7)

b) 45 CFR § 233.20(a) (3) (ii) (D)

c) Maine Public Assistance Payments Manual (MPAPM) Ch. II, Sec. C, p. 1.

SECOND CLAIM FOR RELIEF

16. The decision of the Commissioner of March 18, 1976 is erroneous and constitutes a gross abuse of discretion because Lionel's income is computed on the basis of income which is not actually available. It is therefore in violation of applicable state and federal law: 45 C.F.R. § 233.20(a) (3) (ii) (D); Maine Public Assistance Payments Manual Ch. II, Sec. C, p. 1; 42 USC § 602(a) (7).

THIRD CLAIM FOR RELIEF

17. Plaintiffs are entitled to their attorney fees pursuant to 42 USC § 1988 as amended by P.L. 94-559.

PRAYER

WHEREFORE, Plaintiffs pray that this Honorable Court:

1. Certify that this action may proceed as a class action pursuant to M.R.Civ.P. 23;

2. Declare that the policy set forth in M.P.A.P.M. Appendix C which requires families with stepchildren eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren, income that is actually unavailable to them because their parents have a legal obligation under state law to use a portion of that income to support the mutual children is in violation of 42 USC § 602a (7); 45 CFR § 233.20(a) (3) (ii) (D) and M.P.A.P.M. Ch. II, Sec. C., p. 1.

3. Permanently enjoin Defendants from enforcing the policy set forth in M.P.A.P.M. Appendix C which requires families with stepchildren eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren, income that is actually unavailable to them

because their parents have a legal obligation under state law to use a portion of that income to support the mutual children.

4. Reverse the decision of Defendants of March 26, 1976.

5. Grant the Plaintiffs retroactive benefits.

6. Award Plaintiffs their costs and attorneys' fees.

7. Grant such other relief as is necessary and proper.

Dated: January 6, 1977

/s/ Robert Edmond Mittel,
Attorney for Plaintiffs
178 Middle Street
Portland, Maine 04111

MAINE PUBLIC ASSISTANCE PAYMENTS MANUAL

APPENDIX C

Determination of Need In Stepparent/Other Relative Cases

A. GUIDES TO DETERMINE IF THE AFDC PARENT OR OTHER SPECIFIED RELATIVE CAN BE INCLUDED IN THE AFDC GRANT

1. The combined cashable assets of the AFDC parent and stepparent or other specified relative and his/her spouse must not exceed the limits of the AFDC eligibility.

2. The net personal income of the AFDC parent or other specified relative must be less than the full standard of need for the first adult.

3. The stepparent or spouse of the other specified relative must be unable to support the AFDC parent or other specified relative.

To determine ability to support:

a. Apply the net income of the stepparent or the spouse of the other specified relative to the full standard of need for one adult and the appropriate number of his/her dependent children. Any amount which exceeds such standard will be considered available for the support of the AFDC parent or other specified relative.

b. If the surplus income of the stepparent or spouse of the specified relative is *equal* to or *greater* than the full standard of need of the first adult, the needs of the AFDC parent or other specified relative are considered to be met and, therefore, they *cannot be included* in the AFDC grant.

c. If the surplus income of the stepparent or spouse of the other specified relative is less than the full standard of need for the first adult, such surplus shall be added to the net personal income of the AFDC parent or other specified rela-

tive. If the resulting sum is *equal* to or *greater* than the full standard of need for the first adult, the needs of the AFDC parent or other specified relative are considered to be met, and, therefore, they *cannot be included* in the AFDC grant.

4. If the sum of the net personal income of the AFDC parent or other specified relative and the surplus income of the stepparent or spouse of the other specified relative is *less* than the full standard of need for the first adult the needs of the AFDC parent or other specified relative are considered to be unmet, and *can be included* in the AFDC grant, if they so choose. The surplus income of the specified relative (up to the amount that meets the needs of the AFDC parent or other specified relative) will be considered available for their support and will be included in the eligibility determination. The persons and group income of the AFDC parent or other specified relative will also be included in the eligibility determination.

B. GUIDES TO DETERMINE INCOME AVAILABLE TO AFDC GRANT FROM THE EXCLUDED PARENT WHOSE SPOUSE IS THE CHILDREN'S STEPPARENT LIVING IN THE HOME

1. Determine the stepparent's ability to support the AFDC parent by applying his net income to the full standard of need for the first adult and the appropriate number of his/her children. Any amount which exceeds such full standard (up to the full standard of need of the AFDC parent) is considered available for the support of the AFDC parent.

2. Determine the AFDC parent's personal need by applying the stepparent's surplus income to the full standard of need for the first adult.

a. If the stepparent's surplus income is equal to or greater than the full standard of need for the first adult, the total amount of the AFDC parent's net personal income will be considered available to the AFDC children and included in the payment computation.

b. If the stepparent's surplus income is less than the full standard of need for the first adult, such surplus will be

added to the AFDC parent's net income. The resulting amount of income from the parent which is in excess of the full standard for the first adult will be considered available to the AFDC children and included in the payment computation.

3. When the AFDC children are claimed jointly for income tax purposes by the excluded AFDC parent and the stepparent, acknowledgement is being made that the couple is providing at least 50 per cent of the AFDC children's needs. In those instances where the dollar value of the budgeted contribution of the excluded AFDC parent in combination with the actual contribution of the stepparent is less than 50 per cent of the needs of the AFDC children, or when the actual contributions cannot be established, the combined contribution from both sources will be adjusted to represent an amount equal to one half the appropriate full standard of need of the AFDC children.

4. In the instance of multiple AFDC cases within the same family and when a portion or all of the income from either the parent or stepparent has been considered in the eligibility determination of one AFDC case, such income will not be reconsidered in the eligibility determination of a second or third AFDC case.

STATE OF MAINE SAGADAHOC, ss.	SUPERIOR COURT Civil Action Docket No. CA-76-33
JOLINE THIBOUTOT and LIONEL THIBOUTOT, of Topsham, County of Sagadahoc, State of Maine, *Plaintiffs* vs. STATE OF MAINE and DAVID SMITH, in his capacity as Commissioner of the Maine Department of Human Services and his successors in office, *Defendants*	ANSWER

Defendant hereby answers plaintiff's complaint as follows:

1. Defendant asserts that no facts are alleged in sentences one and two, paragraph one and therefore no answer is required.

2. Defendant denies the allegations in paragraph one, sentence three.

3. Defendant asserts that no facts are alleged in paragraph two and therefore no answer is required.

4. Defendant admits the allegations contained in paragraphs numbered 3, 6, 7, 8, 11, 12, 13 and 14.

5. Defendant denies the allegations contained in paragraphs numbered 4, 5, 9, 10, 15, 16 and 17.

6. Defendant denies that Lionel Thiboutot has standing to sue the Defendant as Plaintiff.

Dated: February 28, 1977

/s/ James Eastman Smith
Assistant Attorney General
221 State Street
Augusta, Maine 04333

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et als,

Defendants

STIPULATIONS OF FACT

1. These stipulations are submitted by agreement of the parties and shall constitute the entire administrative and factual record in this case.

2. The Thiboutot family resides in Topsham, Maine.

3. The only family income are wages earned by Lionel Thiboutot in his capacity as a truck driver at N. T. Fox Lumber Co. where he has been employed for the last ten years, and a small AFDC grant. Mr. Thiboutot earns $490 per month net income and Joline Thiboutot receives an AFDC grant of $64 per month on behalf of her ten-year-old child, Jeannie.

4. Mr. Thiboutot's net income is computed by the Defendants by deducting his work-related expenses from his gross income.

5. The Thiboutot family is composed of the following sub-families:

a) Four mutual children of Lionel and Joline Thiboutot who were married July 10, 1966: April, 10; Sherry, 8; Sandra, 7; and Lionel, 4;

b) Joline Thiboutot and her child: Jeanne, 12;

c) Lionel Thiboutot and his three children: Annette, 17; Donald, 15; and Diane, 14.

6. Prior to November of 1975, pursuant to regulations then in effect, AFDC benefits for the Thiboutot family were computed by attributing a portion of Lionel's net income to the support of the four mutual children identified in paragraph 5 a) above, whom he actually supported and by not attributing any portion of his income to his wife whom he was legally obligated to support.

7. In November of 1975, the Thiboutots were notified of Defendants' decision to recompute their AFDC benefits by a method not making that attribution of income to the mutual children.

8. A fair hearing was conducted to review that decision and the ruling of the Defendants following that fair hearing was to affirm that decision.

9. The specific method used, pursuant to regulations now in effect (attached as Appendix 1 to the Complaint), to presently compute the Thiboutot AFDC grant, which method has been approved by the fair hearing decision above mentioned, is set out below:

a) deduct the standard of need for a parent and three children from Lionel Thiboutot's income:

$ 490
-349
$ 141

b) attribute any excess to Joline Thiboutot and if the excess is greater than $130, exclude Joline from the needs of her portion of the AFDC grant:

$141 is greater than $130 so her needs are excluded;

c) compute her portion of the AFDC grant by subtracting the income available to her child from the ratably reduced standard of need for that one child:

$64
-0-
$64 (the grant of Joline's child);

d) since Lionel's income is greater than the standard of need for himself and his three children, they are not deprived of parental care and support and they are ineligible and receive no portion of the AFDC grant.

10. There are no administrative or procedural irregularities in this matter prior to the filing of the Complaint in this case on April 15, 1976.

11. It is further stipulated by the parties that if the Plaintiffs should prevail in this action in whole or in part and the Plaintiffs are entitled to retroactive benefits, that those benefits shall be computed not on the basis of any of the figures or calculations set forth in the above stipulations, but on the basis of the actual income and work-related expense figures for Mr. Thiboutot computed pursuant to whatever verified figures the Department's regulations require for each month in question for which he would be entitled to the receipt of retroactive benefits.

Dated: February 11, 1977

/s/ Robert Edmond Mittel
Attorney for Plaintiffs
80 Exchange Street
Portland, Maine 04111

/s/ James Eastman Smith
Attorney for Defendants
Assistant Attorney General
Department of Human Services
Augusta, Maine 04333

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et al

Defendants

MOTION FOR SEPARATE TRIAL

Plaintiffs move, pursuant to M.R.Civ.P. 42, for a separate trial on the question of liability, leaving for later determination the questions of retroactive benefits and entitlement to attorneys' fees.

Dated: June 15, 1977

/s/ Robert Edmond Mittel
Attorney for the Plaintiffs

STATE OF MAINE SAGADAHOC, ss.	SUPERIOR COURT Civil Action Docket No. CA-76-33
JOLINE THIBOUTOT and LIONEL THIBOUTOT, *Plaintiffs* vs. STATE OF MAINE, et al *Defendants*	CLASS CERTIFICATION ORDER

After hearing argument from counsel and, there being no objection from the defendant, it is

ORDERED

that Plaintiffs' Motion for Class Certification of February 15, 1977 is granted. The class so certified is defined as follows:

Families in which:

a) each of the two adults has child(ren) living with them which are stepchildren of the other spouse;

b) at least one of the two adults has earned income;

c) there are mutual children of both adults living with them;

d) because of defendant's policy as set forth by Maine Public Assistance Payments Manual, Appendix C, pages 1 and 2, all of the income which is spent to support the mutual children and which is not available to support the remaining

children is nevertheless treated as available to those other remaining children.

Dated: June 28, 1977

/s/ Harold Rubin
Justice, Superior Court

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et al

Defendants

ORDER AND
JUDGMENT

Having reviewed the record and briefs and having heard argument of counsel, it is hereby Ordered, Adjudged and Decreed:

1. This Judgment shall be applicable to Plaintiffs class which is composed of families in which

a) Each of the two adults have child(ren) living with them which are stepchildren of the other spouse;

b) At least one of the two adults has earned income;

c) There are mutual children of both adults living with them;

d) Because of the Defendant's policy set forth in Maine Public Assistance Payments Manual, Appendix C all of the income which is spent to support the mutual children and which is not available to the remaining children is nevertheless treated as available to those other remaining children (the stepchildren).

2. Defendant's policy, as set forth in the Maine Public Assistance Payments Manual, Chapter II, Section C, page 7 (first paragraph) and Appendix C, which requires families with step-

children eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible stepchildren, income that is actually unavailable to them because their parents have a legal obligation under State law to use a portion of that income to support the mutual children, is in violation of 42 USC § 602a (7); 45 CFR § 233.20(a) (3) (ii) (D) and Maine Public Assistance Payments Manual, Chap. II, Sec. C., p. 1.

3. Defendants are permanently enjoined from enforcing the above policy and are ordered to amend Maine Public Assistance Payments Manual, Chapter II, Section C, page 7, (First paragraph) and Appendix C, by adopting in their place new regulations not later than sixty (60) days from the date of the entry of this Judgment.

4. Within 90 days from the entry of this Judgment defendant shall certify to this Court that the new regulations required by Paragraph 3 have been adopted, that all members of plaintiffs' class have been notified of the new regulations and are receiving benefits in accordance with those new regulations.

5. The hearing decision of March 26th, 1976 in the case of Lionel and Joline Thiboutot is reversed and that case is remanded to the defendants for a new hearing at which time plaintiffs' entitlement for AFDC is to be determined pursuant to the regulations adopted pursuant to Paragraph 3.

6.. There being more than one claim for relief before the Court and the Court having determined that there is no just reason for delay, this Judgment is to be entered as a final Judgment forthwith, pursuant to M.R.Civ.P. 54(b). The question of retroactive benefits is reserved for later hearing and the question of plaintiffs' entitlement to attorneys' fees is reserved for further hearing thereafter.

Dated: July 14, 1977

/s/ Harold J. Rubin
Justice, Superior Court

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et al

Defendants

MOTION FOR AWARD OF RETROACTIVE BENEFITS AND ATTORNEYS FEES

Plaintiff moves for an order:

1. awarding retroactive benefits to each member of Plaintiffs class, said benefits to run forward from the time they were reduced or terminated; and

2. awarding Plaintiffs their costs and attorneys fees.

Dated: August 23, 1977

/s/ Robert Edmond Mittel
Attorney for Plaintiffs

NOTICE OF HEARING

TO: James E. Smith

Please take notice that the above motion will be heard by the Court on Friday, October 21, 1977 at 9:30 a.m.

Dated: August 23, 1977

/s/ Robert Edmond Mittel
Attorney for Plaintiffs

STATE OF MAINE SAGADAHOC, ss.	SUPERIOR COURT Civil Action Docket No. CA-76-33
JOLINE THIBOUTOT and LIONEL THIBOUTOT, *Plaintiffs* vs. STATE OF MAINE, et al *Defendants*	]]]]]] INTERROGATORIES]]]]

1. Please identify all members of plaintiffs' class who have been notified of the judgment of the Court pursuant to paragraph 4 of that Judgment.

2. Are there any class members who have not been so notified?

3. If your answer to Interrogatory No. 2 is anything but an unqualified "none," please identify those class members who have not been notified and state the reasons for the failure to notify them.

4. State the total amount (of both state and federal money) to within the nearest one thousand dollars, of retroactive benefits which defendant will be obligated to pay if the plaintiffs prevail on their motion for such an award assuming the award is effective back to

a) November, 1975 or the day each class member's benefits were reduced or terminated; or

b) August, 1976.

5. If your response to plaintiffs' Admission Request No. 1 dated September 21, 1977, is anything but an unqualified admission, please state the actual percentage figure for federal matching for the period in question.

Dated: September 21, 1977

/s/ Robert Edmond Mittel
Attorney for Plaintiffs

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et al,

Defendants

AFFIDAVIT OF
ROBERT E. MITTEL

I, Robert E. Mittel, being duly sworn, do state as follows:

1. I am an attorney licensed to practice law in the State of Maine and have been counsel for plaintiffs for the inception of this litigation.

2. I have been practicing law for 8½ years. For much of that time I have specialized in public assistance litigation involving both AFDC and general assistance. Reported decisions in which I was lead or co-counsel are: *Dupler v. City of Portland*, 412 F.Supp. 1314 (D.Me. 1976); *Stoddard v. Fisher*, 330 F.Supp. 566 (D.Me. 1972) (3-judge court); and *Brooks v. Smith*, 356 A.2d 723 (Me. 1975).

3. I am presently practicing in Portland, Maine and devote a considerable portion of my time to patent and copyright infringement litigation in the various federal district courts.

4. If the plaintiffs had been able to pay my fees I would have charged them $40 per hour for my services. That rate is comparable to the rates that myself and others in the community charge for commercial litigation. See the attached affidavit of Arthur B. LaFrance. (Exhibit A)

5. I have spent 69 hours on this case, as of October 1, 1977. Those hours include time spent as follows: drafting pleadings,

legal research and drafting of legal memoranda and briefs; argument of the case in the Superior Court; preparation of the judgment; negotiations with defendants; telephone calls and correspondence with my clients, opposing counsel and other attorneys. (Exhibit B)

6. A reasonable multiplier for this case, considering its complexity and the amount of increased benefits for the plaintiffs and the contingent nature of the fee is 2.

7. My expenses which include filing fees, telephone toll charges and photocopies are $102.06 (no toll calls for September 1977 are included).

8. My fees are totalled as follows:

69 hours at $40/hour	=	$ 2,760.00
Times 2		5,520.00
Plus expenses		102.06
Total		$ 5,622.06

Dated: October 6, 1977 /s/ Robert E. Mittel

STATE OF MAINE
CUMBERLAND, ss. October 6, 1977

Personally appeared before me the above-named Robert E. Mittel and made oath that the foregoing statements made by him are true according to his best knowledge, information and belief.

/s/ Pearl R. Mahany
Justice of the Peace

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and LIONEL THIBOUTOT,

Plaintiffs

vs.
STATE OF MAINE, et al

Defendants

CERTIFICATION

The Department of Human Services by its counsel, James Eastman Smith, Assistant Attorney General, in accordance with the ORDER and JUDGMENT rendered by this Court on July 14, 1977, hereby certifies the following:

1. That new regulations amending the Maine Public Assistance Payments Manual, Chapter II, Section C, page 7 (First Paragraph) and Appendix C, were adopted and effective within 60 days from the date of the entry of ORDER and JUDGMENT in the above matter.

2. That all members of Plaintiff's class have been notified of the new regulations and are receiving benefits in accordance with those new regulations if eligible.

Dated at Augusta, Maine
October 12, 1977

/s/ James Eastman Smith
Assistant Attorney General
221 State Street
Augusta, Maine 04333

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT,

Plaintiffs

vs.

STATE OF MAINE, et al

Defendants

ANSWER TO INTERROGATORIES

1. The names of all members of Plaintiff's class who have been notified of the judgment of the Court pursuant to paragraph 4 of that Judgment is enclosed herein.

2. All class members have been notified.

3. Not applicable.

4. Defendant will be obligated to pay approximately $16,500 to $18,500 in retroactive benefits if plaintiff's prevail on their motion for such an award assuming the award is effective back to

a) November 1975 ($18,500)

b) August 1976 ($16,500).

A more definite statement cannot be made at this time due to pending cases and lack of response from applicants.

5. Not applicable.

Dated: October 28, 1977

/s/ James Eastman Smith
Assistant Attorney General
221 State Street
Augusta, Maine 04333

STATE OF MAINE SAGADAHOC, ss.	SUPERIOR COURT Civil Action Docket No. CA-76-33
JOLINE THIBOUTOT and LIONEL THIBOUTOT, *Plaintiffs* vs. STATE OF MAINE, et al *Defendants*	FINAL JUDGMENT

Pursuant to the Order of July 14, 1977, the parties having been heard through counsel orally and by briefs, it is ORDERED, ADJUDGED and DECREED:

1. This Final Judgment shall be applicable to Plaintiffs' class which is composed of families in which

(a) Each of the two adults have child(ren) living with them which are stepchildren of the other spouse;

(b) At least one of the two adults has earned income;

(c) There are mutual children of both adults living with them;

(d) Because of the Defendants' policy set forth in Maine Public Assistance Payments Manual, Appendix C, all of the income which is spent to support the mutual children and which is not available to the remaining children is nevertheless treated as available to those other remaining children (the stepchildren).

2. Defendants' policy, as set forth in the Maine Public Assistance Payments Manual, Chapter II, Section C, page 7 (first paragraph) and Appendix C, which requires families with step-

children eligible for AFDC and mutual children ineligible for AFDC to treat as income available to the AFDC eligible step-children, income that is actually unavailable to them because their parents have a legal obligation under State law to use a portion of that income to support the mutual children, is in violation of 42 USC § 602a (7); 45 CFR § 233.20(a) (3) (ii) (D) and Maine Public Assistance Payments Manual, Chapter II, Section C, p. 1.

3. Defendants are permanently enjoined from enforcing the above policy and are ordered to amend Maine Public Assistance Payments Manual, Chapter II, Section C, page 7, (first paragraph) and Appendix C, by adopting in their place new regulations not later than sixty (60) days from the date of the entry of this judgment.

4. Plaintiffs Thiboutot are entitled to retroactive benefits.

5. Plaintiffs' motion for retroactive benefits to each member of Plaintiff's class is hereby denied.

6. Plaintiffs' motion for attorney's fees is hereby denied.

7. Plaintiffs' motion for costs is hereby granted in an amount to be agreed upon between counsel, or, if counsel are unable to agree, in an amount to be determined by the Court after further hearing.

Dated at Bath, Maine
this 23rd day of February, 1978

/s/ Louis Scolnik
Justice, Superior Court

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No. CA-76-33

JOLINE THIBOUTOT and
LIONEL THIBOUTOT
Plaintiffs

vs.

STATE OF MAINE, et al,
Defendants

NOTICE OF APPEAL

Notice is hereby given that plaintiffs appeal from that portion of the final judgment of the Superior Court denying retroactive benefits to the class and denying attorneys' fees.

Respectfully submitted,

Dated: March 10, 1978

/s/ Robert Edmond Mittel
Attorney for Plaintiffs

STATE OF MAINE
SAGADAHOC, ss.

SUPREME JUDICIAL COURT
Law Docket No. SAG 78-1

JOLINE THIBOUTOT, et al.,

Plaintiffs-Appellants

vs.

STATE OF MAINE, et al,

Defendants-Appellees

STIPULATION

Pursuant to M.R.Civ.P. 74(e) the parties hereby stipulate that Lionel and Joline Thiboutot presently receive $391.00 per month in AFDC benefits.

Dated: June 6, 1978

/s/ Robert Edmond Mittel
Attorney for Plaintiffs-Appellants
80 Exchange Street
Portland, Maine 04101

Dated: June 9, 1978

/s/ James E. Smith
Assistant Attorney General
Attorney for Defendants-Appellees
State House
Augusta, Maine 04333

STATE OF MAINE

LAW COURT

PORTLAND, AUGUST 31, 1979

JOLINE THIBOUTOT, et al.

vs.

STATE OF MAINE, et al.

In the above entitled case brought before the Court as a Court of Law from the Superior Court for the County of Sagadahoc and now pending on the Law Docket, the said case having been heard and maturely considered,

IT IS NOW ORDERED, That the Clerk of the Law Court now having the custody of the Law Docket enter upon said docket under said case, and certify to the Clerk of the Superior Court for the County of Sagadahoc the following order, direction, judgment and decree of the Court in said case, to wit:

Appeal sustained.

Judgment vacated insofar as it relates to denial of attorney's fees as part of costs.

Remanded to Superior Court for reconsideration of costs in the light of the opinion herein.

Attest:

James Chute
Clerk of the Law Court

Joline THIBOUTOT et al.

v.

STATE of Maine et al.
Supreme Judicial Court of Maine

Aug. 31, 1979.

Sewall & Mittel by Robert E. Mittel (orally), Portland, for plaintiffs.

James E. Smith, Asst. Atty. Gen. (orally), Augusta, for defendants.

Before McKUSICK, C.J., and POMEROY, WERNICK, DELAHANTY, GODFREY and NICHOLS, JJ.

GODFREY, Justice.

The family of Lionel and Joline Thiboutot included eight children: four by both Lionel and Joline, one by Joline but not Lionel, and three by Lionel but not Joline. In November, 1975, Lionel Thiboutot was notified by the Maine Department of Human Services of a reduction in AFDC benefits which the Department deemed required by a change of federal regulations. The change was essentially as follows: In computing the available income of Lionel in order to determine the amount of AFDC benefits allowed for Lionel's three children of whom Joline was not the mother, the Department would no longer subtract that portion of Lionel's income which went to the support of the four children of both Lionel and Joline (those children not being eligible for AFDC benefits), although Lionel was required by law to support those children and in fact did support them.

The Thiboutots pursued their administrative remedies in an effort to get the Department to revise its ruling. A final ad-

verse decision was rendered by the Commissioner on March 18, 1976. From that decision the Thiboutots filed a timely appeal under Rule 80B, M.R. Civ.P., alleging that the Commissioner's decision was in violation of state and federal welfare statutes. Both the State of Maine and David Smith, as Commissioner of the Maine Department of Human Services, were named as defendants.

On January 7, 1977, an amended complaint was filed seeking class relief as well as relief for the Thiboutots. The amended complaint, brought pursuant to 42 U.S.C. § 1983 as well as Rule 80B, alleged violation of the Social Security Act, 42 U.S.C. § 602(a) (7), and pertinent federal regulations. A motion for class action certification was filed on February 16, 1977, and granted on June 28, 1977.

A motion for a separate trial on the issue of liability was granted on June 17, 1977. On July 15, 1977, judgment was entered for the Thiboutots on the merits. Defendants were enjoined from enforcing the challenged regulation and ordered to adopt new regulations, notify all members of the Thiboutots' class of the new regulations, and pay benefits prospectively to eligible persons in the class. The trial court reserved decision on retroactivity of relief and on the right to an award of attorney's fees.

Defendants complied with the order. On February 27, 1978, final judgment was entered ordering retroactive benefits for the Thiboutots but denying plaintiffs' motions for retroactive benefits for the class and for attorney's fees. From this judgment plaintiffs appeal. The defendants have not cross-appealed. We sustain plaintiffs' appeal on the issue of attorney's fees.

I. Retroactive Benefits

[1] The appellant seeks to have the defendant State of Maine adjudicated liable to pay money to the members of the class in the form of retroactive AFDC benefits. The sovereign immunity of the State of Maine precludes such a judgment unless the state has given its consent to be sued. *Drake v. Smith*, Me., 390 A2d 541 (1978).

The Maine Legislature has not enacted any law manifesting consent that the state be subject to suit for retroactive AFDC benefits. Section 3741 of title 22 (Supp. 1965-78) provides only as follows:

> "The department is authorized to administer and operate a program of aid to dependent children within the Federal Social Security Act and any amendments and additions thereto."

Drake v. Smith, supra, makes clear that the Legislature's authorization of the state's participation with the federal government in a cooperative welfare program, such as aid to families with dependent children, does not itself constitute an implied waiver of sovereign immunity. *Id. at* 545.

[2] Appellant contends, however, that waiver of the state's sovereign immunity may be found in the promulgation of certain regulations by the Department of Human Services which, in appellant's view, mandate the payment of retroactive AFDC benefits to the class. We disagree with appellant's interpretation of those regulations.

Appellant relies on the following provision of the Maine Public Assistance Payments Manual (MPAPM):

> "If the agency's original action is reversed or in any other way modified causing a decision favorable to the claimant, the agency will take immediate steps to insure that within the 60 day period that corrected payments are made retroactively to the date the incorrect action was taken or to the date of application, whichever was later." Maine Public Assistance Payments Manual (MPAPM) ch. I., sec. C, p. 7 (Dec., 1978 Revision).[1]

The regulations contain nothing to suggest that "the claimant" includes other recipients of aid who are in a position

1. The quoted provision was in effect at the time the present action was brought.

similar to that of the claimant but have not made application for review by means of the available administrative and judicial remedies. In the first place, the provision relied on calls for retroactive payments only from the date of claimant's application if that date is later than the date of the incorrect action. Such a provision is not consistent with a purpose of affording full restitutionary relief for correction of the administrative error.

Furthermore, the context of the quoted language indicates that only persons who seek administrative and judicial review of the reduction of AFDC benefits—in this case the Thiboutots themselves—may be considered "claimants." On page 1 of Chapter I, Section C, the regulations state:

> "Federal and State law assure that any claimant, or anyone acting responsibly in his behalf, who believes that proper consideration has not been given to all circumstances surrounding his claim for assistance may request a fair hearing."

The regulations then detail the procedure by which administrative review of an adverse decision by the Department may be obtained. On page 4 of Chapter I, Section C, the regulations continue:

> "The State agency may respond to a series of individual requests for fair hearings by conducting a single group hearing. . . . In all group hearings, whether initiated by the agency or by the claimants, the policies governing fair hearings will be followed."

Here the term "claimants" is used to refer to those individuals who have requested hearings. Moreover, at the time the present action was brought, the paragraph immediately preceding the language appellants rely on provided as follows:

> "Within 5 days of the decision, a letter will be sent over the Commissioner's signature, advising the claimant of the fair hearing decision and of his right to judicial review under the Maine Rules of Civil Procedure [*sic*] Rule 80B, if he is dissatisfied with the decision. The letter will advise the claimant that if he wishes to take advantage of this right, he must file a petition for review with the Superior Court within 30 days of the receipt of the decision with which he is dissatisfied.[2]

Again "claimant" is used to mean an individual who has actually sought administrative review of an agency decision.

We conclude that the regulations did not call for the payment of retroactive AFDC benefits to the unnamed members of the class in the present action. The judgment of the Superior Court, awarding retroactive AFDC benefits to the Thiboutots but not the members of the class, is thus consistent with our interpretation of the departmental regulations, namely, that they require limited retroactive payments only to those who have been "claimants" actually pursuing their rights under the regulations. The promulgation of those regulations cannot be regarded as amounting to a waiver of sovereign immunity for purposes of appellants' action to recover retroactive benefits for all persons in their class.

[3] Appellants contend that the state may not assert sovereign immunity as a bar to their class action because each member of the class had a property right in correct AFDC payments and thus their property was taken by the state without just compensation. They cite *Foss v. Maine Turnpike Auth.*, Me., 309 A.2d 339 (1973), for the proposition that sovereign immunity is not available to the state to bar a citizen's claim for just compensation arising from a violation of the just-compensation clauses of the federal and state constitutions. U.S.Const. amend. V per amend. XIV; Me.Const. art. I, § 21.

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2. This paragraph was revised in December of 1978 and presently states: "Within five days of the decision by the Hearing Officer the copy of the decision, its basis (as described previously) and of the claimant's rights to judicial review under Maine Rules of Civil Procedures [sic] Rule 80B if dissatisfied will be mailed to the claimant. The notice will also advise the claimant that if he wishes to take advantage of this right, he must file a petition for review with the Superior Court within 30 days of the receipt of the decision with which he is dissatisfied." [sic]

[4] Despite occasional suggestions that the right to welfare aid should be regarded as a property right, as distinguished from a mere gratuity, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 n. 8, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970),[3] not all the rights normally associated with ownership of property are available to recipients under the welfare laws and regulations. For example, the federal welfare regulations themselves impose limits on the extent to which state plans may provide for retroactive corrective payments. Thus the federal requirement that a state plan provide for prompt correction of underpayments is in terms conditioned on the existence in the plan of a provision for recoupment of overpayments. 45 C.F.R. § 233.20(a) (12) (ii). Moreover, in such a state plan, "retroactive corrective payments shall be made only for the 12 months preceding the month in which the underpayment is discovered,"[4] 45 C.F.R. § 233.20(a) (12) (ii) (a), and "no retroactive payment need be made where the administrative cost would exceed the amount of the payment," 45 C.F.R. § 233.20(a) (12) (ii) (c).

If the right to correct payments of welfare aid were a property right like the right to payments under an annuity contract or the right to rent under a lease, the correction of underpayments could not be curtailed in such a manner. In view of the qualified nature of welfare rights, cases denying the defense of state immunity where plaintiff's property has been taken by the state without just compensation cannot be relied on as precedents controlling the disposition of a class claim for retroactive welfare benefits.

[5] The state did not appeal the award of retroactive benefits to the Thiboutots. We reject appellant's suggestion that the state's failure to appeal from the judgment for the Thiboutots constitutes a waiver of sovereign immunity in the

3. Citing C. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965). See also H. Jones The Rule of Law and the Welfare State, 58 Colum.L.Rev. 143, 154-55 (1958), and see generally C.Reich, The New Property, 73 Yale L.J. 733 (1964).

4. Applied literally in the instant case, this regulation would lead to the absurd result that because plaintiffs discovered the underpayment promptly they could recover little or nothing.

class action. The judgment of the trial court afforded exactly the relief contemplated by the departmental regulations.

[6] The complaint in the present action was amended to include a cause of action under 42 U.S.C. § 1983[5] on the basis that defendants were "persons" who had deprived plaintiffs of their rights "secured by the Constitution and laws" by violating 42 U.S.C. § 602(a) (7) (a provision of the federal Social Security Act setting forth the basic requirements for state AFDC programs) and 45 C.F.R. § 233.20(a) (3) (ii) (D), a federal welfare regulation defining available income and resources of recipients. In his judgment, the trial justice found that the defendants were violating 42 U.S.C. § 602(a) (7) and the cited welfare regulation but made no finding with respect to violation of 42 U.S.C. § 1983. Appellants contend that the rights defendants deprived them of under color of state regulation were rights "secured by the Constitution and laws" and hence within the ambit of section 1983.

Arguing that the federal courts have exclusive jurisdiction to hear actions under section 1983, appellees assert that the Superior Court had no jurisdiction to hear and determine appellants' section 1983 claim. However, the better considered cases hold that federal and state courts have concurrent jurisdiction to entertain such actions. *E.g., Brown v. Pitchess*, 13 Cal.3d 518, 119 Cal.Rptr. 204, 531 P.2d 772 (1975); *Terry v. Kolski*, 78 Wis.2d 475, 254 N.W.2d 704 (1977). *Contra, Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969). Adjudicating federal claims against state governments in the state courts is likely to produce less friction in federal-state relations and is consistent with the concept of federalism expounded in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The Superior Court had jurisdiction to entertain a claim under section 1983.

5. Section 1983 provides as follows:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] Contrary to another argument made by the appellees, the fact that the trial justice made no finding or mention of a violation of section 1983 in his order and judgment is not in itself conclusive against appellees' liability under that section. *See Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977). The 1983 claim was properly raised before the trial court and cannot be disregarded by the Law Court on appeal merely because the judgment of the trial court made no mention of it.

[8] Whether the appellees' violation of the federal social security law and regulations, with resulting incorrect reduction of AFDC benefits to appellants, constitutes a violation of section 1983 is by no means clear. It had been assumed in a succession of cases in the Supreme Court that section 1983 afforded an appropriate remedy for violation of rights under the federal welfare laws. *See Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), and other cases cited by Stewart, J., dissenting in *Chapman v. Houston Welfare Rights Organization*, _____U.S._____, _____, 99 S.Ct. 1905, 1944-45, 60 L.Ed. 2d 508, 557-58 (1979). However, the *Chapman* case itself brought to the surface serious differences of opinion within the Court over whether section 1983 encompasses a deprivation of rights arising solely out of the Social Security Act. *Chapman* did not resolve the issue, holding only that federal district courts have no jurisdiction under subsection (3) and (4) of 28 U.S.C. § 1343 to entertain a claim under section 1983 that a state welfare regulation is invalid merely because it conflicts with the Social Security Act. From the several opinions in *Chapman*, it appears that four members of the Court think section 1983 is available for relief in such a case and three think it is not. Two Justices, members of the majority, expressed no opinion on the scope of section 1983.

With some hesitancy in view of the close division in *Chapman*, we conclude that section 1983 afforded appellants a remedy in the Superior Court for deprivation of rights under the Social Security Act even though those rights were not of constitutional dimension. Until the Supreme Court has spoken definitely to the contrary, we think it would be incorrect to

ignore the long line of federal cases in which section 1983 has been treated without question as a proper vehicle for such relief. Neverthelss, appellants' claim for retroactive benefits for the class is barred by the sovereign immunity of the State of Maine.

In *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974), the Supreme Court held that the immunity of the states under the Eleventh Amendment[6] bars recovery in a federal district court of retrospective welfare benefits erroneously denied by state officials before entry of the federal court's order determining the wrongfulness of their action. The Court distinguished *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which had held that a federal court could without violating the Eleventh Amendment, enjoin state officials to conform their future conduct to the requirements of federal law even though the injunction might have some fiscal impact on the state. The Court based the distinction on the difference between prospective and retrospective relief, the latter being perceived as having potential for more drastic impact on state treasuries.

Although the rationale of *Edelman* seemed to be placed in some doubt by the decision in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), holding municipalities to be "persons" subject to 1983 actions for both prospective and retroactive relief in federal courts,[7] a recent decision, *Quern v. Jordan*, _____U.S._____, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), has reaffirmed *Edelman*, interpreting it as holding that Congress did not intend to abrogate the states' sovereign immunity when it enacted section 1 of Civil Rights Act of 1871, the precursor of section 1983. In the course of his opinion expressing the view of a majority of the Court, Mr. Justice Rehnquist said:

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6. U.S. Const. amend. XI, provides as follows:
"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

7. Monell overruled Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961), which had held that a municipality was not a "person" within the meaning of section 1983.

> "Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. Instead, § 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1." _____U.S. at _____, 99 S.Ct. at 1146, 59 L.Ed. 2d at 368.

See also *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed. 2d 1114 (1978). The majority of the Justices in *Quern v. Jordan* reached their decision by interpreting the word "person" in section 1983 as excluding the states because of their sovereign immunity. Justices Brennan and Marshall, concurring in the result, observed that the actual decision did not require such a rationale and objected to it. We consider the issue to be still not definitely resolved by the Supreme Court.

Appellants in the instant case contend that *Edelman* and other federal decisions according immunity to the states in 1983 actions brought in federal court for retrospective damages are not applicable in a state court, where the Eleventh Amendment creates no problem. However, a theme running pervasively through the federal decisions is that unless a state has consented to being sued for retrospective welfare benefits mistakenly withheld, it should be immune to section 1983 actions for their recovery. The liability for such benefits is peculiar: First, unlike liability in tort, liability for such benefits to a class does not typically arise from wilful or even negligent wrongdoing; underpayment of welfare benefits to a class is more likely to result from good-faith misinterpretation of the complex federal regulations under which welfare programs must be administered. Second, the financial burden on the state treasury to meet retrospective payments of welfare benefits may become great if a large class of welfare recipients has been affected for a long time. The many pressing needs for

welfare assistance and the practical difficulty some states encounter in raising matching funds to meet them adequately suggest caution about compelling state welfare officials to assign priority, in effect, to correcting past underpayments, which can amount to large sums, ahead of current and perhaps more critical needs.[8] The limitation, referred to earlier in this opinion, contained in the social security regulations themselves suggest strongly that correction of past underpayments is not regarded by welfare officials as a matter of highest priority in the administration of the AFDC program.

[9] Though the question is not free from doubt, it is our conclusion that, in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under 42 U.S.C. § 1983 to recover the amount of past AFDC underpayments, at least where there is no allegation or evidence that the underpayments were made in bad faith for a racially discriminatory or other constitutionally impermissible purpose. Our reliance on *Edelman* and *Quern* accords with the rationale adopted by the Supreme Court of Washington in denying section 1983 relief in *Edgar v State*, 92 Wash.2d 217, 595 P.2d 534 (1979).[9]

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8. See *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921, 93 S.Ct. 1552, 36 L. Ed.2d 315. But of *Jiminez v. Weinberger*, 523 F.2d 689 (7th Cir. 1975), *cert. denied sub nom. Mathews v. Jimenez*, 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d 1204 (1976) (retroactive class relief permitted against the Secretary of Health, Education and Welfare where disability insurance benefits had been denied under an unconstitutional federal statutory classification). In *Jiminez*, a case strongly relied on by appellants, no question of state sovereign immunity was involved. The United States was deemed to have waived its sovereign immunity by enacting 42 U.S.C. § 404, providing for overpayments and underpayments of federal old-age, survivors, and disability insurance benefits. The court noted the difference between ordering a state to make payments of improperly withheld welfare benefits and ordering the Secretary to pay retroactive benefits out of the Federal Disability Trust Fund (42 U.S.C. § 401(b)) to which plaintiffs had contributed through taxation.
9. The circumstances of the *Edgar* case were entirely different from those of the instant case. However, *Edgar's* claim was one for money damages against the state under section 1983.

It is our conclusion also that the State of Maine has not waived its immunity from such a class action and has effectively asserted it to bar the class action for retroactive benefits under section 1983 in this case. We are led to this conclusion by the rationale of our decision in *Drake v. Smith*, Me., 390 A.2d 541 (1978), fortified by the considerations referred to above that have prompted the federal courts to accord the states an immunity under the Eleventh Amendment from similar actions.

II. Attorney's Fees

Appellants contend that they are entitled to attorney's fees under 42 U.S.C. § 1988, as amended by the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559 § 2, 90 Stat. 2641. The last sentence of section 1988 now provides:

> "In any action or proceeding to enforce a provision of [certain civil rights legislation, including 42 U.S.C. § 1983] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Appellants assume that P.L. 94-559 is applicable to the state courts and that the Superior Court in this case denied their motion for the award of attorney's fees in the exercise of its discretion. They insist that the legislative history of P.L. 94-559 indicates Congressional intent to restrict the judicial discretion to deny fees when a section 1983 action has been successful. Appellants' position is that only in exceptional cases are fees to be denied to a prevailing plaintiff in a section 1983 action. They rely partly on the Senate Report accompanying P.L. 94-559, which contains the following comment:

> "A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, 'should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 38 S.Ct. 964, 19 L.Ed.2d 1263 (1968)." S.Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 5908, 5912.

[10] Except for some kinds of tortious conduct, the Maine state courts have no authority to include attorney's fees as part of costs in the absence of statutory authorization or agreement of the parties. The Social Security Act itself contains no such authorization applicable to the violation of 42 U.S.C. § 602(a) (7) that occurred here. If appellants have any right to attorney's fees, that right must come from the provisions of section 1988 on the basis that they have "prevailed" to some extent in their section 1983 action.

Even though appellants are barred by state immunity from recovering retrospective benefits in their class action, they have prevailed on a claim cognizable under section 1983. Both in its judgment entered July 15, 1977, and in its final judgment, the Superior Court give plaintiffs prospective relief in the form of enjoining the defendants from enforcing the erroneous policy set forth in the departmental regulations and ordering them to amend the Maine Public Assistance Payments Manual. In its judgment of July 15, 1977, the court required defendants to certify that all members of plaintiffs' class had been notified of the regulations and were receiving benefits accordingly.

[11, 12] The trial court did not indicate whether it thought it was granting such prospective relief in response to plaintiffs' Rule 80B appeal or to the section 1983 count of the amended complaint. Although prospective relief was available through the 80B appeal alone, it was also available through section 1983 with the result that if the Civil Rights Attorney's Fees Awards Act is applicable to the state courts, the trial justice had discretion to award attorney's fees as part of plaintiff's costs. *See Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977). It was held in the *Seals* case that the presence of a substantial constitutional claim under section 1983 justified the allowance of attorney's fees even though the relief was granted exclusively on alternative state grounds.

Nothing in the language of P.L. 94-559 indicates whether it is intended to be binding on the state courts, and the Senate and House reports concerning the measure shed no light on

that question.[10] Before the amendment of 1976, the provisions of section 1988 related in terms exclusively to actions in the federal courts.[11] Congress enacted the amendment in response to the Supreme Court's decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), holding that it was error for a federal court to award attorney's fees as an element of costs in an environmental suit in equity: federal courts may not ordinarily include attorney's fees in costs without statutory authority. The genesis of the amendment was thus a case litigated in the federal court system, and the Senate and House reports address the question only in the context of federal litigation.

Although it seems extraordinary that Congress would enact a statute affecting the authority of the states to control costs in their own courts without stating explicitly its intention to do so, there can be little doubt that Congress has the constitutional power to enact a statute requiring the states to pay court costs in their own courts if it finds such a measure necessary to enforce the provisions of the Fourteenth Amendment. See U.S. Const. amend. XIV § 5; *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). The solecism, if it be one, of requiring the states to pay attorney's fees as part of costs in their own courts is not much greater than that of requiring them to do so in the Federal Courts, and *Hutto v. Finney, supra*, makes it clear that the Eleventh Amendment is no bar there to recovering attorney's fees against the states under section 1988. In *Hutto*, most of the Court thought that, unlike liability for retroactive damage claims, liability for attorney's fees poses no serious threat to state treasuries.

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10. For what it may be worth, in commenting on the bill that became P.L. 94-559, Representative Drinan said that the measure "would authorize State and Federal Courts to award counsel fees in actions brought under specified sections of the United States Code relating to civil and constitutional rights." 122 Cong. Rec., No. 151—Pt. II, H 12158 at 12159 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan).

11. But see *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239-40, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969) where the Court used language which seemed from context to imply that section 1988 (before its amendment in 1976) established a rule of damages applicable in a state court in an action under 42 U.S.C. § 1982.

The argument in favor of construing the Civil Rights Attorney's Fees Awards Act to apply to the state courts is derived from the main purpose of the Act: namely, to encourage private citizens to take action, which they might not otherwise take, as "private attorney's general" to enforce civil rights laws. That purpose ought to be carried out uniformly, it is said, in state courts as well as federal. The supreme courts of Alaska and Wyoming have apparently taken this view of the act, treating it as applicable to their own state courts. *Tobeluk v. Lind, Alaska*, 589 P.2d 873 (1979) (upholding a discretionary denial of fees under § 1988). In each case, the court assumed without discussion the applicability of the statute to state courts. The question of applicability was explicitly considered and resolved affirmatively by the New York Supreme Court, Appellate Division, Fourth Department, in *Young v. Toia*, 66 A.D.2d 377, 413 N.Y.S.2d 530 (1979). Furthermore, in a companion case, the same New York court imported into section 1988 the limitation on the trial court's discretion that the federal courts must observe under *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) and *Northcross v. Board of Education*, 412 U.S. 427, 93 S.Ct. 2201,37 L.Ed.2d 48 (1973). *Ashley v. Curtis*, 67 A.D.2d 828, 413 N.Y.2d 528 (1979).

The desirability of uniform remedies throughout the nation in civil rights actions and the unanimity of such authority on the point as so far exists persuade us that the Civil Rights Attorney's Fees Awards Act of 1976 should be applied in the state courts of Maine.

As the instant case is presented to us on appeal we cannot tell why the trial justice denied an attorney's fee as part of costs, for he stated no reasons for the denial. Appellants have treated the denial as an erroneous exercise of discretion under section 1988, but we have no way of knowing whether the trial justice denied them because he thought section 1988 inapplicable or because he had exercised his discretion under section 1988 and found the allowance of attorney's fees to be inappropriate for reasons he thought sufficient. If the latter was the case, we do not know what standard he applied in considering the question.

We must therefore remand the case for reconsideration of the question of attorney's fees. Under 42 U.S.C. § 1988, the trial justice must, on remand, first exercise his discretion to determine whether plaintiffs are entitled to any award of fees. In this case, the standard for making that determination is not so nearly absolute in application as appellants suggest that it must be. Both the *Newman* and *Northcross* cases, *supra*, involved racial discrimination. In *Newman* the Supreme Court held that one who succeeds in obtaining an injunction under Title II of the Civil Rights Act of 1964 "should ordinarily recover an attorney's fee [under section 204(b) of that act] unless special circumstances would render such an award unjust." 390 U.S. at 402, 88 S.Ct. at 966. In *Northcross*, plaintiffs had prevailed in litigation aimed at desegregating the public schools of Memphis. In its judgment, the Court of Appeals for the Sixth Circuit had denied attorney's fees without stating a reason. The Supreme Court vacated the judgment insofar as it related to denial of costs and attorneys' fees and remanded to the Court of Appeals for reconsideration in the light of the *Newman* standard.

[13] We think the *Newman-Northcross* standard invites far more balancing of competing considerations than appellants seem to suggest,[12] and that all aspects of the case may be

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12. See, e.g. *Zarcone v. Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, _____U.S._____, 99 S.Ct. 843, 59 L.Ed.2d 38.

As Mr. Justice Powell observed, concurring in part and dissenting in part in *Hutto v. Finney*, 437 U.S. 678, 683, 98 S.Ct. 2565, 2584 n.7, 57 L.Ed.2d 522, 546 n.7 (1978), there is nothing in the Civil Rights Attorney's Fees Awards Act that requires the "routine imposition of counsel-fee liability on anyone." He cited the House Report to P.L. 94-559 where the following passage may be found:

"2. Judicial Discretion

The second key feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes requiring that fees be awarded to a prevailing party. Again the Committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions. This approach was supported by the Justice Department on Dec. 31, 1975. The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing H.R. 15460." H.R.Rep. No. 94-1558, 94th Cong. 2d Sess. (1976).

properly taken into account by the trial justice in the exercise of his discretion. The fact cannot be overlooked that appellants' litigation has led to the correction of an erroneous state welfare rule with resulting long-term benefit to an indeterminate class of present and future AFDC recipients. The public has an important stake in the correct application of welfare funds, and the public interest has thus been served in some measure by this litigation. The *Newman-Northcross* standard thus provides a suitable starting point for the trial court's reconsideration of the award or denial of attorney's fees.

If the trial court decides on remand that an attorney's fee should be awarded, it may properly take into account any pertinent factors discussed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

Because of the possibility that review by this Court of the trial court's ultimate decision may become necessary, the record should reflect the considerations on which the trial justice bases his decision.

The entry is:

Appeal sustained.

Judgment vacated insofar as it relates to denial of attorney's fees as part of costs.

Remanded to Superior Court for reconsideration of costs in the light of the opinion herein.

ARCHIBALD, J., did not sit.